Filed 2/18/09 Morris v. South. Cal. Edison CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KENNETH MORRIS, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA EDISON COMPANY, Defendants and Respondents.	B206236 (Los Angeles County Super. Ct. No. BC364886)

APPEAL from a judgment of the Superior Court of Los Angeles County, Reginald A. Dunn, Judge. Reversed.

Alan Burton Newman, PLC and Alan Burton Newman for Plaintiff and Appellant.

Southern California Edison Company and William Davis Harn for Defendant and Respondent.

Plaintiff Kenneth Morris (plaintiff) appeals from a summary judgment granted to defendant Southern California Edison Company (defendant). The case is brought under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.),[1] specifically, section 12940, which sets out specific types of unlawful conduct by employers, labor organizations, employment agencies and others, taken against employees, applicants for employment and others. Plaintiff's complaint alleges causes of action for disability discrimination, failure to accommodate a disability, and failure to engage in an interactive process on ways to accommodate plaintiff's disability.

The record discloses evidence that raises triable issues of material fact regarding defendant's motive and intent when it removed plaintiff from the foreman position that he had held for a lengthy period of time.[2] The evidence also raises issues regarding whether defendant unlawfully failed to accommodate defendant's disability (poor eyesight) to allow him to remain in his foreman position; and whether defendant violated plaintiff's rights when it informed him of its intention to transfer him to its accounting department, and advised him that the accounting position was the only one available to him. For those reasons, we will reverse the summary judgment and remand the case for further proceedings.

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[1] Unless otherwise indicated, all references herein to statutes are to the Government Code.

[2] In accordance with settled principles, we view the record in a light most favorable to plaintiff's position in order to determine if triable issues of fact are present.

BACKGROUND OF THE CASE

1. *Plaintiff's Complaint*

The following is a summary of the allegations in plaintiff's complaint filed on January 17, 2007.

a. Plaintiff worked for defendant for 37 years, beginning his employment in June 1968 and ending it in June 2005, when he was allegedly forced to retire. He suffered a disability in August 2002 which severely affected his vision. Plaintiff underwent various treatments, including surgery, to remedy his sight problem. In April 2003, he obtained a release from his doctor to return to work, with the limitation that he could not drive a motor vehicle. The vision disability had left him legally blind, as that term is defined by the Department of Motor Vehicles. At defendant's request, he returned to work.

b. Plaintiff's position (which he held both before and after his vision problem), required him to visit various sites to supervise the repair of equipment being used at those sites. He was not required to do any work at the sites other than to supervise, and he was always accompanied to the sites by his back up person. Prior to his disability, plaintiff and the back up person shared driving the company car to sites and meetings, but after plaintiff returned to work in April 2003, the back up person did all of the driving.

c. In April 2004, after plaintiff had been working a year with his sight disability and the accommodation of having the backup person do all of the driving, the person who had been supervising him was replaced and the new supervisor refused to

allow plaintiff to continue working as a foreman because plaintiff did not have a driver's license. Defendant refused to discuss the accommodation, or alternative accommodations, and refused to offer plaintiff a comparable position. Plaintiff protested the supervisor's decision, arguing that his job description did not require him to have a driver's license; nevertheless, the supervisor refused to return him to his position. Plaintiff was forced to go on sick leave until it expired in June 2005. At that point, defendant again refused to permit plaintiff to return to his regular job or provide an accommodation, or engage in an interactive process concerning work for him. He was thus placed in the position of having to take early retirement or be fired.

Plaintiff asserted causes of action for (1) discrimination based on his medical condition since defendant unreasonably required him to have a driver's license in order to maintain his job position, in violation of section 12940; (2) failure to accommodate plaintiff's medical condition by permitting his backup person to handle all of the driving, in violation of section 12940; and (3) failure to engage in an interactive process to arrive at ways to accommodate plaintiff's disability or provide him with comparable employment, all of which allegedly forced him to retire on the basis of his disability, in violation of section 12940.

2. *Defendant's Summary Judgment Moving Papers*

In its motion for summary judgment, defendant contended that (1) plaintiff's first cause of action failed because plaintiff cannot establish that he was a disabled person qualified to perform one or more of his essential job functions as a traveling crew foreman even with reasonable accommodations; (2) plaintiff's second cause of action

failed because defendant had provided accommodation for plaintiff's disability and plaintiff had rejected alternate work that was consistent with his medically certified work restrictions; and (3) plaintiff's third cause of action failed because defendant did engage in discussions with plaintiff, and it was plaintiff that had abandoned the pursuit of further accommodations and communications from the date he was relieved through the date he elected to retire.

3. *Evidence Presented to the Trial Court*[3]

a. *Plaintiff's Employment History*

Plaintiff presented evidence showing that he had begun working for defendant in June 1968 as an auto attendant at one of defendant's vehicle repair garages. A year later, he took the position of service man. In 1972 he became an automotive mechanic. In February 1980, he became a travel crew mechanic, and, in August of 1998, he was

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[3] Both plaintiff and defendant submitted evidentiary objections to the other's evidence. The reporter's transcript for the December 7, 2007 hearing on the summary judgment motion shows that the trial court did not make rulings on the objections at that hearing. Moreover, there is no indication in the December 7, 2007 minute order that the objections were ruled on. The minute order directed defendant to submit an attorney order and judgment.

The only ruling is in an attorney order labeled "order granting defendant SCE's motion for summary judgment." That order contains a blanket statement: "Plaintiff's objections to Defendant's evidence are overruled. Defendant's objections to Plaintiff's [sic] the Declaration of Plaintiff are sustained." This attorney order was signed by the court and filed on April 8, 2008. The judgment was signed and filed on December 14, 2007, four months earlier.

We review the judgment as it existed at the time it was made. There were no evidentiary rulings at the time the trial court signed and filed the judgment. The attorney order was not made retroactive to the date of the judgment. We have therefore disregarded the evidentiary objections and have considered all of the evidence.

upgraded to the position of travel crew foreman. (That position is apparently also known as traveling crew foreman.) The position is covered by a collective bargaining agreement between defendant and the International Brotherhood of Electrical Workers.

b. *Plaintiff's Visual Disability*

With respect to his disability, plaintiff presented evidence showing that his vision became impaired in 2002 and he had to take time off from work. Specifically, the vision in one of his eyes deteriorated due to cancer, causing his retina to detach, and he was off work for a short period of time. Later, the cancer affected his other eye and the vision in that eye began to deteriorate and so he left work to have treatments for his vision. He and his supervisor, James Scheidler, kept in touch and he returned to work when his supervisor called him and asked if he was physically fit to resume his job. His supervisor testified at his deposition that plaintiff was highly knowledgeable in the position of travel crew foreman. Plaintiff provided defendant with a written release from his doctor saying that he was physically fit to resume his duties except that he was not able to drive.[4] His vision was not good enough to permit him to obtain a driver's license. He told his supervisor when they spoke about his coming back to work that he would not be able to drive, and the supervisor told him that "we would work around it."

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[4] There are two doctors' releases (return to work letters) in the appellate record. It appears that one is from plaintiff's first medical leave and the other from his second medical leave. The text of the first release to return to work states: "Work restrictions: Has [decreased] vision—needs help with visual tasks." The second release states: "Ken Morris is able to return to work (restricted to office type work and no driving secondary to limited vision)."

He returned to work in April 2003. The supervisor testified that as far as he knew, no one ever complained that plaintiff was not visiting work sites, and it never caused any problems.

c. *Plaintiff's Duties As Travel Crew Foreman*

Plaintiff's supervisor, Jim Scheidler, testified at a deposition that plaintiff's duties as foreman were to process paperwork, fill out performance evaluations, upgrade information in computers, "on occasion" oversee the work of the several traveling crew mechanics that he was in charge of and help them if necessary as a "third hand," and talk to defendant's clients[5] about the quality of the work of his crew. At his deposition, plaintiff expanded on this list of his duties, saying he also ran and assigned the crews, and interfaced with defendant's customers. Plaintiff also controlled the budget for his crew, and took care of their time sheets and paying bills.

(1) *The "Mechanical Work" Issue*

(a) *Plaintiff's Deposition*

Plaintiff was asked at his deposition whether he had done any mechanical work after he returned to his job in 2003 from his sick leave. Plaintiff answered that people in his job classification are not expected to do mechanical repairs because they do not have the time to do mechanical work, and because defendant has mechanics to do repair work. He stated that occasionally he would assist his mechanics when they needed an

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[5] By "clients," plaintiff's supervisor meant defendant's internal clients, its own employees.

extra pair of hands to hold a hose or something of that nature and the other mechanics were busy, but he was not doing the repair work himself, he was assisting, and he did not have time "to go out and do repairs."

When presented with a formal, written job description of a traveling automotive foreman which states that the position requires a foreman to repair and service automotive equipment, plaintiff testified that while the specifications in the written description were one thing, "that's just not in reality what happened in real life" and foremen did not have time to do repairs because they were busy doing their other job duties. That formal written job description for a travel crew foreman is dated December *1973*. Plaintiff produced employee performance appraisals of his work for the years 1998, 2000 and 2002 showing that the true nature of his position, as traveling crew foreman, was no longer a hands-on mechanical one but rather was one involving management and supervision. Moreover, he testified that the performance evaluations were very complementary as to his abilities in performing his job. Plaintiff also testified that when he interviewed for the permanent position of traveling crew foreman in 1998, he was only asked managerial questions that pertained to all types of manager positions, and was not asked questions relative to the position of traveling crew foreman.

Plaintiff further testified that when he became a travel mechanic on the travel crew (which was in 1980), he also functioned as the backup person for the successive foremen he worked under and ran the crew for them. He never saw any of the foremen perform mechanical repairs, indeed they did not even have tools at their work locations,

and to his knowledge, those foremen were not criticized for not performing mechanical repairs. If from time to time the foremen for other travel crews performed repair work on vehicles, it was to break the monotony of their office work. Moreover, although he did perform the duties of a traveling mechanic when he held that job position (working in the field from a travel truck repairing vehicles), in the 25 years that he worked with the traveling mechanic crew (18 years as predominately the foreman's backup person [1980-1998] and five years as the foreman [which he began in 1998]), his work as an actual mechanic was "probably no more than a few months, total." And when he did work on vehicle repairs it was usually assisting the members of the crew in their repair work.

Plaintiff testified that when he acted as the backup person to a foreman, his task primarily involved (a) directing crew members to various places where vehicles had broken down, (b) contacting them to find out what they had accomplished on the previous day, (c) determining who was available to do regular scheduled maintenance on vehicles, (d) working on the crew members' time sheets, and (e) approving the repair part purchases made by crew members. When he served as a backup person, he and the foreman were together on almost a daily basis so that if the foreman was not at work for some reason (e.g., the foreman was sick or on vacation), plaintiff would be fully informed of what needed to be done, what was being done, and where the mechanics were. When he was acting as an upgrade foreman (temporary foreman), he would sometimes assist the traveling mechanics in the repairs they were doing but he performed very little mechanical service on vehicles by himself. The same was true

when he was the backup person to the foremen that preceded him—he mostly assisted the foremen, not the mechanics.

He testified that when he formally became the crew foreman (that is, obtained the title of foreman), his job duties did not change that much. Occasionally he would go to check on a job, but the mechanics on the crew were all journeymen so he did not have to actually physically check their work. It was more talking to them and to the person who asked for the repair. Plaintiff could not remember making any mechanical repairs after he was given the title of foreman. His own backup person, Jose Arturo Calvillo (who apparently was known both as Jose and as Art), would go with him, just as plaintiff had gone with the foremen he worked for when he was a backup person. Occasionally Calvillo would perform field mechanical work. Plaintiff was never criticized for not making mechanical repairs, nor told that he was required to make them, until the day he was terminated. His deposition descriptions of the work he performed as a backup person, and as a foreman prior to his vision problems, were essentially the same as the work he performed after he returned to work from his vision sick leave (other than driving to work sites).

Asked at his deposition whether the position of *traveling crew* foreman included doing mechanical maintenance work just as the position of *garage* foreman required the garage foreman to do mechanical maintenance work, plaintiff answered that neither position—traveling crew foreman nor garage foreman—involved doing mechanical maintenance work because "that's what they have mechanics for." He added that in both positions the foremen did not have time to do mechanical maintenance work.

(b) *Ulloa's Deposition*

Raymundo Ulloa, a member of plaintiff's traveling mechanics crew, testified that on the occasions when he himself (Ulloa) was temporarily upgraded to the position of travel crew foreman between 2000 and 2006, which he stated occurred "very seldom," he did not perform mechanical maintenance when he went to work sites because "there is a lot of stuff you have to do as a foreman." He has worked as both a garage mechanic and a traveling mechanic, and he said that neither garage foremen nor traveling crew foremen do mechanical maintenance work because "there wasn't any time."

(c) *Chan's Deposition*

When John Chan, who was Jim Scheidler's manager, (as noted above, Scheidler was plaintiff's supervisor), testified as to his understanding of what the traveling crew foreman does, he did not include doing mechanical maintenance; nor did Mr. Scheidler in his testimonial description of the duties of a traveling crew foreman. The closest Scheidler came to saying that plaintiff's job included doing maintenance work was that when plaintiff was at a job site where his mechanics were working, plaintiff might assist a mechanic as a "third hand."

(2) *The "Driving" Issue*

The aforementioned 1973 job description of a "traveling automotive foreman" stated that the foreman position required an ability to maintain a Class 1 driver's license, and the foreman "travels to work locations which do not have Automotive Services Department garages." As noted earlier, the release from plaintiff's doctor, which enabled plaintiff to return to work in April 2003, stated that he was "restricted to

office type work and no driving secondary to limited vision." Plaintiff stated in his responses to defendant's form interrogatories that 20% of his essential job functions required him to drive except that a fellow worker did the driving.

Plaintiff testified that other than driving, he performed the same duties after he returned to work in April 2003 from his medical leave as he had before he took sick leave for his vision problem. His supervisor, Scheidler was aware that he could not drive when they talked about his coming back to work, and his supervisor was happy to have him back at work because plaintiff was very good at his job. Until the day he was removed from his position of travel crew foreman plaintiff was never told that he was required to do the driving to work locations.

Plaintiff stated in his declaration that in his position as backup person to traveling crew foremen, he would drive the foremen to the work locations, and the foremen were not told that it was they who had to do the driving. Plaintiff testified that both before and after he became legally blind, his backup person, Jose Arturo Calvillo, did the driving for plaintiff when plaintiff directed him to, just as plaintiff had done the driving for the foreman he had previously worked under, and it was never required that plaintiff rather than Calvillo do the driving on those occasions. Calvillo testified that both before and after plaintiff developed his vision problem, they went together to sites, and whereas before plaintiff developed the vision problem they shared driving responsibility, afterwards Calvillo always did the driving. Calvillo also testified that prior to plaintiff becoming the foreman, at times he (Calvillo) was a backup person for

other foremen and he and the other foremen would share driving responsibility and it was the usual thing for the foreman or the backup person to drive to various locations.

Plaintiff testified that before he was removed from his position as foreman, he moved his residence to be closer to where Calvillo lives because he and Calvillo used to carpool to work, and his new residence was approximately two blocks from Calvillo's home. When Calvillo was on vacation or not at work for some reason, plaintiff would be driven to work by a family member and another person on his crew would do the driving while at work.[6]

The aforementioned member of plaintiff's traveling mechanics crew, Raymundo Ulloa, testified that prior to plaintiff becoming his foreman, the previous foremen used backup persons to drive the foremen around and to "do a lot of things." He stated that before plaintiff went on his medical leaves, Calvillo was generally with plaintiff when plaintiff came to the sites where Ulloa was working. Calvillo would be driving while plaintiff was doing paperwork and "getting things done." After plaintiff returned to work from his eye illness, nothing changed, there were no problems that were due to plaintiff's limited vision, and the job went as always.

(3) *The "Light Duty" Issue*

There is an issue whether plaintiff was placed on "light duty" when he came back to work from his medical leave in 2003. Plaintiff's testimony regarding the issue was as

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[6] Plaintiff also testified he was under the impression his vision would improve with more surgeries.

follows. He was under the impression that he was "in full duties" in his position as traveling crew foreman except that he would not be sharing driving with his backup person. He never requested "light duty" and he was never told that he was being placed on "light duty." Between the time plaintiff returned to work in April 2003 and his meeting in April 2004 with people in defendant's human resources and management divisions (Ruth Grothe, Robert Smith and Ken Eilefson), no one said anything to him about his not sharing the driving. And no one told him he was not fulfilling the requirements of his job or that he was costing the defendant extra money. Moreover, given that the foremen under whom he had worked did not always do their own driving and did not do mechanical work, there was no reason for plaintiff or anyone to believe that he was doing "light duty" when he returned to work.

However, his supervisor, Jim Scheidler, testified at a deposition that after plaintiff returned to work in his position of travel crew foreman, it was on a light duty basis. Nevertheless, Scheidler also stated that no additional people were hired to perform plaintiff's duties; as far as he (Scheidler) knew, there was no additional cost to defendant regarding plaintiff's duties; and if there had been complaints about plaintiff's work, the complaints would have come to him. Scheidler never told plaintiff that unless his eye sight improved he would be taken off light duty. In January 2004, plaintiff was given an award for workplace performance.

d. *Defendant Removes Plaintiff from the Foreman Position*

On or about April 4, 2004, Patrick Shipwash, a person from defendant's equal opportunity department, called Ruth Grothe, a person in defendant's human resources

department and relayed information that one of the travel crew mechanics whom plaintiff oversaw, a Miguel Nieves, had voiced concern that another mechanic and plaintiff might have TB, and Nieves was concerned that he would also become infected. Grothe, in turn, notified defendant's health care nurse, Lucie Cummings-Paget, and defendant's director of transportation services, Harry Carpenter. The health care nurse sent an e-mail to Susan Heller, defendant's medical director, informing Heller of the same and telling Heller that she told Grothe to "keep the number of folks limited as to this situation."

Shipwash further advised Grothe that plaintiff had difficulty reading and driving, and that plaintiff had been picked up at his home and taken to work, and driven from location to location (including maybe medical appointments), and this had been going on for almost 18 months. Grothe in turn contacted the director of transportation services, Harry Carpenter. Carpenter told Grothe that he was under the impression that plaintiff occasionally might need help to get his work done, and Carpenter asked Grothe to confer with John Chan, the garage operations manager. Chan told Grothe that plaintiff was occasionally given help to perform his duties.

Grothe stated in her declaration that she was familiar with plaintiff's position. She stated she participated in the selection process for a traveling crew foreman when plaintiff was chosen for that position and she supported placing him in the foreman position. During both the selection process and in conversations with transportation

services division managers, supervisors, and plaintiff himself, she became "readily familiar with the duties and responsibilities" of the travel crew foreman position.[7]

On or about April 6, 2004, Grothe spoke with defendant's disability management representative, Lucie Cummings-Paget, "who agreed that it was not appropriate to have [plaintiff] at work until they had more information." Cummings-Paget advised Grothe that plaintiff should be told not to report to work pending an investigation into his work restrictions. Because plaintiff's supervisor, regional manager Jim Scheidler, was on vacation, Grothe directed Robert Smith, another regional manager who was due to assume responsibility for the travel crew on April 12, 2004, to advise plaintiff not to report for work until further notice, and to advise plaintiff that "management had received information" that plaintiff was having difficulty driving, reading and performing his duties and management wanted to be sure he could work safely.

Robert Smith stated in his declaration that on or about April 6, 2004, Grothe called him and directed him to advise plaintiff that he was being placed on paid administrative leave until his work limitations could be clarified. At that time, Smith was not aware that plaintiff had work restrictions because plaintiff did not report to Smith. So, Smith made a telephone call to plaintiff and explained the situation to him, and plaintiff "seemed upset and confused." Several days later, Grothe told Smith that plaintiff's work restrictions limited him to office work and precluded him from driving.

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[7] Grothe did not state in her declaration that she was personally familiar with how plaintiff was performing his job after he returned to his work from his sick leave.

Scheidler might have also told Smith about plaintiff's limited vision when Smith was assuming responsibility, from Scheidler in April 2004, for the travel crew. Grothe told Smith of reports that plaintiff was having his backup person, Calvillo, drive him to "various locations." Scheidler told Smith that because Scheidler was short on staff, plaintiff had been permitted to work a light duty pending improvement to his eyesight to allow him to return to full duty. Like Grothe, Smith stated his understanding that the position of traveling crew foreman required a driver's license, driving to locations in the service territory, and performance of mechanical maintenance, and he felt it was not a good use of resources to have one of the mechanics drive plaintiff around.

Cummings-Paget advised Grothe on April 9, 2004 that having spoken to plaintiff, she believed it was safe for him to work within his restrictions of office work with no driving. Grothe then spoke with Jim Scheidler who advised her that he was aware of plaintiff's limited vision but had decided to have plaintiff work on a light duty until his eyesight improved, and that Jose Calvillo had driven plaintiff to department meetings when it was convenient for both of them to attend. *Scheidler told plaintiff to return to work on Monday, April 12, 2004.*

Nevertheless, according to Grothe, she was concerned for plaintiff's safety if he was in the field with impaired vision, concerned that he had been on light duty without a permanent work assignment, concerned that he could not perform the mechanical maintenance and inspection functions of his job, and concerned that having a travel crew mechanic drive plaintiff around was not economical because it prevented the mechanic from doing maintenance work. Grothe stated in her declaration that from her

previous position of interviewing candidates for the travel crew foreman job, and from "reviewing the typical duties and abilities required for the job, she knew that the position of travel crew foreman required the foreman to maintain a class A driver's license, perform maintenance work, and inspect the work of the mechanics. So, she decided to look into what position plaintiff could be given that would permit him to remain a productive member of defendant's workforce but be better for defendant from a productivity sense. After she conferred with defendant's law department and disability management, she recommended to Harry Carpenter that plaintiff be given an office assignment "consistent with his work limitations" and Carpenter agreed and told her to arrange a meeting with plaintiff to inform him of the decision to end his light duty assignment.

According to Smith, Grothe directed him to arrange a meeting with plaintiff because it had been decided that plaintiff could no longer hold the foreman position due to his eyesight and so Smith met with plaintiff at the Mira Loma substation and told plaintiff there would be a meeting to discuss his ability to do his job and he was being removed from his foreman responsibilities and people were looking into other positions that plaintiff could perform given his work restrictions.

In plaintiff's recollection of these events he did not recall a phone call to him from Smith. Rather, plaintiff states that on or about April 7, 2004, Smith came to the site where plaintiff was working (Mira Loma substation) and advised plaintiff that he was being placed on paid administrative leave but he could not tell plaintiff why. Smith told plaintiff he needed to check into something and then he would get back to plaintiff.

Plaintiff was very confused by what Smith told him and by being placed on administrative leave. When plaintiff went home that day he called Chester Snyder, who was defendant's garage operations manager at that time. Plaintiff had known Snyder for a long time. He asked Snyder why he had been placed on leave and Snyder told him he was not directly involved in the matter and could not talk to plaintiff about it, and Smith would get back to plaintiff in a day or so.[8] About two days later, James Scheidler asked plaintiff to sign a medical release form for information relating to vision problems and infectious disease but plaintiff declined, saying he felt he should speak to an attorney.[9]

Plaintiff remembers that sometime later, he was told to come to a meeting in Pomona. Present at that meeting, which was held on April 15, 2004, were plaintiff, Smith, Grothe and a Ken Eilefson. Plaintiff, Grothe and Smith have different versions of what was said at the meeting. Plaintiff states that only he and Grothe spoke at the

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[8] Of interest is an e-mail from Chester Snyder to a Denise Martin, who it appears might be a person in defendant's law department. The e-mail is dated December 16, 2005. Snyder states in his e-mail that he spoke to John Chan and to plaintiff's supervisor, Jim Scheidler, and asked them how and what they used to evaluate plaintiff's ability to perform his job duties upon his return to work after taking sick leave, and they both stated they were not involved in any evaluation or work restriction review. "According to Jim, he informed [plaintiff] to deal with the payroll clerk Ted Sakamoto and provide Ted with any releases or restrictions. [¶] They also made it clear to me they had no involvement in placing [plaintiff] off. They stated the decision was made by Harry Carpenter and Ruth Grothe with Ken Eliefson who was John Chans [sic] backup at the time. [¶] Based on the information that I have on hand . . . and the statements from John and Jim, it appears management did not do a very good job of requesting, reviewing or managing this issue. We did not do our du [sic] diligence! Sorry and good luck."

[9] Plaintiff was later examined and tested for TB, and the result was negative.

meeting. Grothe told him it had been determined that he was not able to perform his job duties given his limited eyesight.[10] Plaintiff voiced his disagreement, telling Grothe that he had been told on many occasions that he was doing a good job and a better job than some of the other foremen, and he had also received awards earlier that year for his work. No one at that meeting told plaintiff that he had only been performing some of the duties of his position or that his job performance had suffered since he returned from medical leave. Grothe told plaintiff that defendant might be able to provide him with a position as a clerk in the accounting office. However, based on his 36 years of working for defendant, plaintiff felt the position required extensive work on a computer which would be difficult because of his vision, and moreover he had no experience as an accountant. He did not think he would be efficient at the clerical position and it would be a waste of his abilities.[11] Moreover, plaintiff knew that taking the clerk's

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[10] At their depositions, Robert Smith testified that it was defendant's "director," Harry Carpenter, who made the decision to relieve plaintiff of his duties, and Carpenter testified that was correct.

[11] The job title of the position offered to plaintiff is "Transportation Accounting Clerk I" and it was for the defendant's transportation services department, the same department in which plaintiff had always worked. Grothe testified at her deposition that the position involved both computer work and working with figures. Plaintiff testified that although he did do paperwork in his job as foreman, it was just part of the job. His computer work as foreman involved only "time sheets, e-mails, [and] those types of things." Although he did approve bills submitted by members of his crew, the computer portion of that was done at another location.

According to defendant's written job description of the position Grothe offered to plaintiff (accounting clerk I), the position required, among other things, a driver's license and operation of a light duty truck, a background in taxation, courses in accounting, computer work, teaching other people how to do accounting, and the

position would have meant a substantial reduction in pay because he would not have overtime work in the clerk's position. So he explained to Grothe that he did not want to go to such a position, it was not right for him, and he was best utilized in his current position as a traveling crew foreman because he knew the job so well. He suggested to Grothe that alternatively he be placed in the position of garage foreman because there were about 40 such positions, but Grothe refused to consider that alternative and she never mentioned any other position. She just gave him contact information. Neither Grothe, Smith, nor Eilefson ever suggested that plaintiff's abilities should be evaluated, nor did they consider other jobs for him.

Grothe stated in her declaration that at the meeting, Smith brought plaintiff into the meeting room, plaintiff bumped into the chair that he was to sit on, was told that Grothe was also present in the room, and did not appear to know that Mr. Eilefson was in the room until Eilefson spoke to him. Smith explained to plaintiff that, given his vision problems, plaintiff could not perform his duties to observe his crew mechanics, check their work, do some mechanical work himself, and drive to work locations and because his eyesight had not improved, he would no longer have the position of foreman because safety was a concern, but that there was clerical work he could perform. However, plaintiff declined the clerical work because working at a computer all day would hurt his eyes, and moreover, he felt he could see well enough in daylight

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performance of "clerical and accounting duties at any level within department accounting office. Plaintiff maintains these are things that are not in his background or visual ability.

to observe the mechanic's work, and his wife had been driving him around at work, and he had been doing a good job and had received recognition for his work. Grothe told him that he would be off work on disability status until it could be determined what his capabilities were. It was explained to him that he would be assessed to determine what tasks he can perform, that he was a valuable employee, and that defendant had an effective program for returning people to work and he was not in danger of being terminated. He was placed on "full pay sick" pending his consultation with disability management. She was told he never contacted disability management to participate in a job assessment, and she did not hear from him until 2005 or 2006 when he told her he had retired. Smith testified that he told plaintiff at the meeting that there were "other possibilities in the department that we could find work for him" but Smith did not remember specifically mentioning to plaintiff what those other possibilities were.

Based on his having been a union steward for nearly 20 years, plaintiff did not believe that under the contract between the union and defendant, he could have been compelled to take the accounting clerk position. After his position as foreman was taken from him, plaintiff never contacted anyone at the defendant company about returning to work in some other capacity. Plaintiff stated in his declaration that he was told that he could be on disability so he went on long term disability which only paid him 60% of his base pay.[12] However, because of the drastic reduction in pay, he

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[12] His annual compensation at that time had been approximately $72,000 in base pay and $30,000 in overtime pay.

decided to take early retirement in June 2005 because it gave him "a little bit more money than the disability was." He never contacted anyone at defendant's disability management component about returning to work, nor did anyone from there contact him about returning to work in a different capacity. He was 53 years old when he retired. He had planned on working until he was in his 60's. Since his retirement, he has applied for a number of jobs but has not been able to find comparable work with comparable compensation because of his age, impaired vision, lack of education, and the high compensation he had been earning when he worked for defendant.

DISCUSSION

1. *Standard of Review*

We review the order granting defendant's motion for summary judgment on a de novo basis. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 474.) In doing so, we apply the same rules the trial court was required to apply in deciding the motion.

When the defendant is the moving party, it has the burden of demonstrating as a matter of law, with respect to each of the plaintiff's causes of action, that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849.) If a defendant's presentation in its moving papers will support a finding in its favor on one or more elements of the cause of action or on a defense, the burden shifts to the plaintiff to present evidence showing that contrary to the defendant's presentation, a triable issue of material fact actually exists as

to those elements or the defense. (§ 437c, subd. (p)(2).) That is, the plaintiff must present evidence that has the effect of disputing the evidence proffered by the defendant on some material fact. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 849.) Thus, section 437c, subdivision (c), states that summary judgment is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Because a summary judgment denies the adversary party a trial, it should be granted with caution. (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 865.) Declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact. (*Id*. at pp. 865-866.) If, in deciding this appeal, we find there is no issue of material fact, we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court, or first addressed on appeal. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481.) If, on the other hand, we find that one or more triable issues of material fact exist, we must reverse the summary judgment.

2. *General Principles Applicable to Wrongful Discrimination Cases*

Because it is often difficult to produce direct evidence of an employer's discriminatory intent, certain rules regarding the allocation of the burdens and order of presentation of proof have developed in order to achieve a fair determination of the question whether intentional discrimination motivated an employer's actions. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, fn. 8.)

At trial, the plaintiff must present a prima facie case of discrimination: (a) he was a member of a protected class; (b) he was qualified for the position he sought or he was performing competently in the position he held; (c) he suffered an adverse employment action (for example, he was terminated, demoted, or denied employment); and (d) there was evidence that suggested the employer's motive for the adverse employment action was discriminatory. The burden on the plaintiff at that stage is not onerous, but it does require the plaintiff to present evidence of actions taken by the employer from which the trier of fact can infer, if the actions are not explained by the employer, that it is more likely than not that the employer took the actions based on a prohibited discriminatory criterion. If the plaintiff established a prima facie case of discrimination, a rebuttable presumption of discrimination would arise and the burden would shift to the employer to rebut the presumption with evidence that its action had been taken for a legitimate, nondiscriminatory reason, and if the employer did that, the presumption of discrimination disappeared, and the plaintiff's task was to offer evidence that the justification presented by the employer was a pretext for discrimination or additional evidence of discriminatory motive. The burden of persuasion on the issue of

discrimination would remain with the plaintiff. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354-356.)

In *Hersant v. Department of Social Services* (1977) 57 Cal.App.4th 997, 1003-1005, the court stated that in employer-initiated summary judgment motions, an employer's presentation of evidence showing a nondiscriminatory reason for an adverse employment action, coupled with the employee's presentation of a prima facie case of discrimination, would not result in the need for a trial on the issue of discrimination. Rather, the employee must present evidence to rebut the employer's claim of nondiscriminatory motivation, or the employer would prevail on its motion. "[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Id*. at pp. 1004-1005.) The employee must do more than raise an issue as to whether the employer's action was unfair, unsound, wrong or mistaken, because the overriding issue is whether discriminatory animus motivated the employer. (*Id*. at p. 1005.) " '[T]he [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for . . . [the asserted] non-discriminatory reasons." [Citations.]' [Citations.]" (*Ibid*.) "In other words, plaintiff must produce

substantial responsive evidence to show that [the employer's] ostensible motive was pretextual; that is, 'that a discriminatory reason more likely motivated the employer or that the employer's explanation is unworthy of credence.' " (*King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 433.)[13]

3. *Defendant Met Its Evidentiary Burden and Plaintiff Presented a Prima Facie Case of Discrimination*

As an employee with a disability, plaintiff was a member of a class of persons protected under section 12940 against adverse employment actions not based on a bona fide occupational qualification or applicable government security regulations. To support its motion for summary judgment, defendant was required to present evidence of a legitimate, nondiscriminatory reason for taking the adverse employment action of removing plaintiff from his longtime position of traveling crew foreman. Defendant presented evidence that plaintiff was unable to perform or not performing certain of the duties listed in the 1973 job description for that position—maintaining a class A driver's license and driving, and doing mechanical repairs on defendant's vehicles. On its face, it is sufficient to support a summary judgment in favor of defendant.

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[13] In *Guz v. Bechtel National, Inc*., *supra*, 24 Cal4th 317, 360, where an employer moved for summary judgment, the court stated that it was not determining whether the plaintiff had an initial burden of presenting a prima facie case of discrimination, only that once the employer presented a nondiscriminatory reason for taking an adverse employment action against the plaintiff, the plaintiff would have to "show there was nonetheless a triable issue that decisions leading to Guz's termination were actually made on the prohibited basis of his age."

Plaintiff, however, presented evidence of a prima facie case that he was discriminated against—he is a member of a protected class (persons with a physical disability); there was evidence that, after he came back from his sick leave, he was performing his job competently and did not even need an accommodation to help him perform his duties;[14] he suffered an adverse employment action when he was removed from the position of travel crew foreman which resulted in a loss of status and pay; and evidence suggests a discriminatory motive for the adverse employment action. The evidence is that plaintiff's employer did not contact the persons who actually supervised plaintiff and worked with him to determine whether plaintiff was functioning well at his job with his limited sight. Smith, Grothe, and Carpenter, persons who did investigate plaintiff or made the decision to remove plaintiff from his position, never observed plaintiff at his job to see if he was functioning well. And plaintiff was removed from his position even though Cummings-Paget advised Grothe on April 9, 2004 that having spoken to plaintiff, she believed it was safe for him to work within his restrictions of office work with no driving.

However, the question remains whether plaintiff presented the necessary "substantial evidence" that defendant's stated nondiscriminatory reason for removing him from his job was untrue or pretextual, or that defendant removed him from his position with a discriminatory animus. We now address that issue.

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[14] Plaintiff contends that his not driving and not doing mechanical work were not the result of an accommodation because they were a part of his regular job performance.

4. *Evidence Which Meets Plaintiff's Substantial Evidence Burden*

As noted above, a prima facie case of discrimination is not sufficient to defeat an employer's summary judgment if the employer has presented a nondiscriminatory reason for the adverse employment action taken against the plaintiff. The plaintiff must produce additional, substantial evidence that will support a finding by the trier of fact that the employer's proffered motive for the adverse employment action is actually a pretext and its true motive was unlawful discrimination. The plaintiff must show weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reason for its action such that a reasonable trier of fact could find that reason not believable. Here, the record contains substantial evidence of pretext.

The record reflects evidence showing that the alternative position which Grothe and Smith presented to plaintiff at their April 15, 2004 meeting (transportation accounting clerk I), required plaintiff to perform one of the very duties that plaintiff was faulted for not performing in his job as travel crew foreman—driving. Further, whereas there was substantial evidence of a long-time history that defendant's traveling crew foremen did not have to drive because their backup persons could do the driving for them, there is no evidence that the alternative position offered to plaintiff had such a history or would accommodate in some other fashion plaintiff's inability to drive. Moreover, whereas there was evidence that plaintiff was very good at being a travel crew foreman, there was no evidence that he had the far different skills and knowledge called for in the job description of the alternative position.

Additionally, as noted above, in determining whether plaintiff was functioning well at his job with his limited sight, and in removing plaintiff from that position, defendant relied on the opinions of people who had never observed him doing his job, and defendant did not seek out the opinions of persons who actually supervised plaintiff and worked with him. Robert Smith and Ruth Grothe admitted during their depositions that they had never observed plaintiff perform his duties as travel crew foreman. Smith testified that the only contact he had with plaintiff was when he placed plaintiff on paid leave and when he was at the subsequent meeting when plaintiff was removed from his position. Carpenter, the person who made the decision to remove plaintiff from the foreman position, testified that he never asked plaintiff's supervisor whether plaintiff was performing adequately.

Chan, who supervised plaintiff's supervisor, testified that although he and Carpenter talked about the fact that plaintiff "had some eye problems," they never discussed relieving plaintiff from his duties. It does not appear that either Chan, or plaintiff's supervisor Scheidler, had anything to do with defendant's ultimate determination that plaintiff was unable to perform his job duties as traveling crew foreman. Given that plaintiff still remained in the position of traveling crew foreman a year after his doctor released him to return to work, a trier of fact could reasonably infer that Scheidler had found his work to be satisfactory. Indeed, plaintiff had received an award during that year. Scheidler acknowledged that (a) he had received no complaints about plaintiff, (b) plaintiff did not require an additional person to help him

do the job, and (c) plaintiff's limited eyesight was not costing defendant additional money.

Moreover, there was a substantial amount of evidence concerning the other "duty" that plaintiff was allegedly not performing—hands on mechanical work. The evidence (testimony and written evaluations of plaintiff's job performance), made the point that plaintiff's position involved management activities, not hands on service repair work. Plaintiff testified that in the decades that he (a) worked as a backup for travel crew foremen, (b) functioned as an upgrade travel crew foreman, and (c) held the title of travel crew foreman, the position of foreman did not involve actual mechanical repair work. At best, it involved the occasional "third hand" assisting the repair crew members, or a foreman engaging in repair work as a respite from the boredom of his office work. Evidence from plaintiff and members of his crew was to the effect that the foreman had too many other duties to take time to do repair work. Plaintiff also testified that until he was removed from his job, he was never criticized for not making repairs and not told he was required to do such work. In their testimony, neither Raymundo Ulloa, Jim Scheidler, nor John Chan indicated that the foreman's work includes mechanical repair work.

In sum, this evidence was sufficient to permit the cause of action for unlawful discrimination to go to trial.

5. *The Cause of Action for Failure to Accommodate*

Section 12940, subdivision (m) makes it an unlawful employment practice to fail to make a reasonable accommodation for a known physical disability of an employee.

Section 12926, subdivision (n) provides that "reasonable accommodation" includes either "(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. [¶] (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."

An employer seeking to defeat, in a summary judgment motion, a cause of action for failure to accommodate, must establish by undisputed facts that (a) the plaintiff had refused a reasonable accommodation offered by the employer, (b) the defendant had no vacant position in its organization for which the disabled employee was qualified, and capable of performing with or without an accommodation, or (c) the employer "did everything in its power to find a reasonable accommodation" but the employee failed to engage in accommodation discussions in good faith. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.) We also observe that employers are not obliged to provide the best accommodation to the employee or the one the employee wants. Rather, the employer has discretion to choose between effective accommodations, for example, choosing the less expensive one or the one more easy to provide to the employee. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228.)

Here, defendant asserts that it was entitled to summary adjudication on this cause of action because plaintiff had refused the reasonable accommodation it offered to him in the form of the accounting clerk I position. We do not agree. Given the requirements

of that position that we have already noted, it is a question of fact whether offering that position was a *reasonable* accommodation.

Further, while it is true that defendant was not required to permit plaintiff to *choose* an alternative position for which he is qualified if there is a reasonable exercise of defendant's discretion in providing another position, there is evidence that defendant rejected out of hand plaintiff's suggestion that he be placed in the alternative position of garage foreman without discussing the suggestion.

Defendant also contends it has defeated this cause of action because it "offered [plaintiff] the possibility of other alternate placements, however, [plaintiff] never followed up, choosing instead to remain on paid disability leave. By "offering plaintiff the possibility of alternative placements," defendant means Grothe's declaration wherein she stated she gave plaintiff the telephone number of defendant's disability management supervisor and suggested he call her, she told plaintiff that an assessment could be done for him to see what tasks he can do, and he could utilize the defendant's return to work program. Defendant also cites to plaintiff's acknowledgement that he did not contact the disability management program and did not contact Grothe or someone else at defendant to ask if there were any jobs for him.

However, plaintiff asserts that while he was given this contact information, he was not told his job skills could be evaluated, and no one from disability management ever contacted him regarding returning to work. In *Spitzer v. Good Guys, Inc*. (2000) 80 Cal.App.4th 1376, 1386, the court held that telling an employee to continually check the employer's job hotline was, as a matter of law, not a reasonable accommodation.

The *Spitzer* court also observed that the "reassignment to a vacant position" form of accommodation means more than treating the disabled employee like any other job applicant. While reassignment does not require that the employer move another employee, violate another's employee's collective bargaining rights, promote the disabled employee or create a new job, it does require affirmative action on the part of the employer. If the employer cannot reasonably accommodate the employee's limitations by leaving the employee in his or her current position (a question of fact here given the evidence that the accommodations were really status quo), the employer is only relieved of the duty to reassign the employee if reassignment would impose an undue hardship on the employer's operations or there is no vacant position for which the employee is qualified. (*Id*. at p. 1389.) Thus, issues of fact remain to be resolved with respect to this cause of action as well.

6. *The Cause of Action for Failure to Engage in a Good Faith Effort to Accommodate Plaintiff's Disability*

Subdivision (n) of section 12940 provides that it is an unlawful employment practice for an employer to "fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known . . . disability or known medical condition." "While a claim for failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 54."

Defendant asserts it engaged in the interactive process because it permitted plaintiff to go on sick leave when his eyesight was failing, then permitted him to return on light duty to his position of travel crew foreman, then offered him the clerical position, and thus defendant interacted in good faith. We do not find this sufficient. Defendant relies on *Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th 226-229, where the employer permitted the employee an additional seven months of leave, and then when he returned to work with restrictions, the employer consulted with the employee's doctors and found an available vacant position that fit the employee's restrictions. Here, there is no evidence that plaintiff was given extra leave time when he took sick leave. Moreover, whether plaintiff was placed on light duty when he returned to work is an issue of material fact, as is whether the clerical position offered to plaintiff was one for which he was qualified.

Plaintiff's cause of action begins with the April 15, 2004 meeting when he was informed he was being removed from his job. At that time, defendant rejected the request that he be reassigned to a garage foreman position, without giving any reason why the request was rejected. Defendant also offered a position for which a trier of fact could reasonably find plaintiff was not qualified. The only other thing defendant asserts it did was provide contact information which plaintiff did not utilize, which we have already stated is not the required affirmative action. Moreover, defendant itself states that if the employee rejects an offer of a position *that accommodates his limitations*, the employer is not obligated to search further for another position. That analysis brings us back to the question whether the clerical position proposed by defendant reasonably

accommodated plaintiff's limitations. We do not read the law so narrowly as to hold that *any* office position would suffice to accommodate plaintiff's limitations.

DISPOSITION

The summary judgment is reversed. Costs on appeal to plaintiff.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.